

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

December 21, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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**No. 00-0059**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**LORETTA M. GILMEISTER AND GILMEISTER FARMS, INC.,  
A WISCONSIN CORPORATION,**

**PLAINTIFFS,**

**v.**

**EUGENE ZDROIK & SONS, INC., A WISCONSIN  
CORPORATION, EUGENE C. ZDROIK AND JANE M. ZDROIK,**

**DEFENDANTS,**

**STATE BANK OF ROSHOLT N/K/A COMMUNITY FIRST BANK,**

**DEFENDANT-RESPONDENT,**

**AG SERVICES OF AMERICA, INC.,**

**INTERVENOR-APPELLANT.**

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APPEAL from an order of the circuit court for Portage County:  
DENNIS D. CONWAY, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 VERGERONT, J. Ag Services of America, Inc. appeals an order denying its motion to intervene in a foreclosure action and for relief from the judgment of strict foreclosure on a land contract entered on January 5, 1993. The judgment of strict foreclosure provided for an equity of redemption of the property prior to July 1, 1993. Ag Services sought permission to intervene and obtain relief from the judgment in order to redeem the property by paying the balance owed. The trial court determined it did not have jurisdiction to set aside or amend the judgment because the property had not been redeemed nor had a request to the court been made to modify the judgment prior to the expiration of the redemption period. Ag Services contends the trial court erred in denying its motions because it had an interest in the property that arose subsequent to July 1, 1993, and the court had the authority to grant it the relief it sought on equitable grounds.

¶2 We affirm the order, but our analysis differs from that of the trial court. We conclude that Ag Services' later-acquired interest in the real estate is not sufficient under WIS. STAT. § 803.09(1) (1997-98)<sup>1</sup> to entitle it to intervene as a party in the action, and, without being a party, it may not move for relief from the judgment of strict foreclosure.

## BACKGROUND

¶3 The real estate that is the subject of this appeal was conveyed by a land contract from Gilmeister Farms, Inc., Loretta Gilmeister and Max Gilmeister,

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

deceased, to Eugene Zdroik & Sons, Inc. in May 1989.<sup>2</sup> After Zdroik & Sons, Inc. defaulted on the payments, Loretta Gilmeister and Gilmeister Farms, Inc. initiated an action against it for foreclosure and other relief and also named the State Bank of Rosholt (now known as Community First Bank) as a defendant because the Bank had a second mortgage on the property.<sup>3</sup> The Gilmeisters, the Zdroiks, and the Bank entered into a stipulation whereby the Bank paid the Gilmeisters the amount due under the land contract, the Gilmeisters assigned all of their interest in the land contract to the Bank, and the parties stipulated to the entry of an order for judgment and judgment of strict land contract foreclosure. The judgment was entered on January 5, 1993, and provided for a period of redemption until July 1, 1993.

¶4 On the same date they entered into the stipulation for the order of judgment and judgment, the Bank and the Zdroiks entered into an Addendum to Stipulation, Order for Judgment and Judgment which was not filed with the court. In the addendum, the Bank agreed that the redemption period in the judgment would be held in abeyance as long as certain specified conditions were met, and when those conditions were satisfied, the Bank would convey the real estate and personal property to the Zdroiks for the sum remaining on the original land contract assumed by the Bank. One of the conditions was that the Zdroiks would make payments as specified in a commitment letter that the Bank and the Zdroiks

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<sup>2</sup> The land contract also conveyed some personal property.

<sup>3</sup> We will refer to Loretta Gilmeister and Gilmeister Farms, Inc., the plaintiffs in the action, as "the Gilmeisters," and the defendants, Eugene Zdroik & Sons, Inc., Eugene C. Zdroik and Jane M. Zdroik, as "the Zdroiks."

had negotiated.<sup>4</sup> The addendum provided that, if the Zdroiks failed to make timely payments pursuant to any of the notes held by the Bank or failed to perform under the commitment letter and the default continued after July 1, 1993, the Bank could immediately assume possession of the real estate.

¶5 The next document filed with the court after the judgment entered on January 5, 1993, was an “Affidavit Relating to Redemption” filed by the Bank on May 10, 1999. In the affidavit, the Bank president averred that the Zdroiks were “in default under the terms of the judgment and supplemental stipulation” and there was now due to the Bank, as assignee, the sum of \$160,240.49 plus interest. The purpose of the affidavit, the Bank president averred, was to establish the Bank as the lawful owner of the real estate.

¶6 The following month Ag Services filed a motion to intervene and a complaint, which alleged as follows. Ag Services had a security interest in the real estate. Ag Services had made advances to the Zdroiks that were used to pay real estate taxes and pay the Zdroiks’ obligations to the Bank, and Ag Services had also acquired by assignment a judgment, note, and mortgage regarding the real estate held by another creditor, J.B. Marketing, Inc. Ag Services did these things in reliance on a lending relationship between the Bank and the Zdroiks. Ag Services was entitled to the rights of a junior lien holder under WIS. STAT. § 846.17 because the lending arrangement between the Bank and the Zdroiks was an equitable mortgage rather than a strict foreclosure judgment, and because the

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<sup>4</sup> The commitment letter provided that the Zdroiks were to make specified payments in 1993 on crop security agreements, assigned by the Gilmeisters to the Bank, and on the Bank’s existing second mortgage. Beginning March 1, 1994, they were to pay \$50,000 annually to be applied first to interest on the Bank’s existing second mortgage, second to the interest on the sum advanced by the Bank to the Gilmeisters in exchange for an assignment of their interest in the land contract, and third to the principal of the Bank’s existing second mortgage.

Bank had actual knowledge of the creation of additional liens against the property subsequent to July 1, 1993. The complaint requested an order declaring that Ag Services had the right to redeem the property by paying into the clerk of courts the amounts due to the Bank, and that it thereafter would be subrogated to all rights of the Bank in the action.

¶7 Contemporaneous with the filing of its motion to intervene and complaint, Ag Services deposited with the clerk of courts the sum of \$165,237.95 “in exercise of its right of redemption,” the amount the Bank president’s affidavit averred was due.

¶8 Ag Services also moved under WIS. STAT. § 806.07(1)(h) for relief from judgment. The motion stated that it was based on the “modification of the original terms of the judgment negotiated between [the Zdroiks] and [the Bank] ... in an addendum ... and on the conduct of the Bank and [the Zdroiks],” which consisted of the Bank regularly negotiating and accepting payment from Ag Services on behalf of the Zdroiks in 1996, 1997 and 1998.

¶9 At the evidentiary hearing on Ag Services’ motions, the credit manager for Ag Services testified that it began making operating loans to the Zdroiks in 1996. Initially the security was crops and crop insurance and, later, the real estate. Ag Services did not do a title search before taking the real estate as security. It knew the Bank had a mortgage but did not know about the judgment of strict foreclosure until the Bank filed the “Affidavit Relating to Redemption.” Ag Services probably would not have taken the assignment of J.B. Marketing’s interest in the real estate had it known of the judgment of strict foreclosure.

¶10 The court denied Ag Services’ motions. In its oral decision, the court stated that to decide the motion to intervene, it had to have the jurisdiction to

do so. It did not have jurisdiction, the court concluded, because the redemption period specified in the judgment had expired long ago and the judgment made no mention of extending the redemption period. The court stated that this lack of jurisdiction also precluded it from deciding the equitable arguments Ag Services made for relief from the judgment. The court's written order stated that the strict foreclosure judgment was a final determination of the rights of the parties, the real estate had not been redeemed within the redemption period nor had a request been made to modify that period prior to its expiration, and the court therefore had no jurisdiction to set aside or amend the judgment.<sup>5</sup>

## DISCUSSION

¶11 We address first Ag Services' contention that it had the right to intervene in this action, since this is the threshold issue.<sup>6</sup> Before Ag Services may obtain the relief it ultimately seeks—permission to redeem the real estate—the January 5, 1993 judgment must be vacated. WISCONSIN STAT. § 806.07(1) provides that a court may relieve “*a party or legal representative* from a judgment, order, or stipulation” (emphasis added) in certain circumstances. Ag Services is not a party to the action that resulted in the judgment, nor is it a party to the stipulated addendum. Ag Services contends that it has a right to intervene under WIS. STAT. § 803.09(1) because it “claims an interest relating to the property or transaction which is the subject of the action and ... is so situated that the

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<sup>5</sup> The court in its written order referred to the judgment as entered on December 16, 1992, but that was the date on which the parties signed the stipulation, order, and judgment; judgment was entered on January 5, 1993.

<sup>6</sup> Although the trial court did not address the issue of Ag Services' right to intervene because the court decided that it lacked jurisdiction, we may affirm a trial court's decision based on grounds other than those relied on by the trial court. *State v. Patricia A.M.*, 176 Wis. 2d 542, 549, 500 N.W.2d 289 (1993).

disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest...." According to Ag Services it has such an interest because the real estate is security for the amounts Ag Services loaned the Zdroiks to make the payments required by the addendum, and it is security for the debt the Zdroiks originally owed to J.B. Marketing, the interest of which Ag Services has acquired by assignment.

¶12 The sufficiency of the interest asserted as a ground for intervention under WIS. STAT. § 803.09(1) is a question of law, and we review questions of law de novo. *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 549, 334 N.W.2d 252 (1983).

¶13 WISCONSIN STAT. § 803.09(1), as is pertinent here, requires that Ag Services have "an interest relating to the property ... which is the subject of the action and ... the disposition of the action may as a practical matter impair ... [its] ability to protect that interest." The circumstances that created the interest Ag Services asserts in the real estate occurred after the Gilmeisters' action was concluded by the judgment of strict foreclosure, and after the period of redemption provided for in the judgment had expired. In essence, Ag Services claims it did not know about that judgment, and the Bank and the Zdroiks misled it by not disclosing the judgment, with the result that it loaned money to the Zdroiks, thereby acquiring an interest in the real estate as security. Accepting this assertion as true for purposes of argument, it is undisputed that Ag Services had no interest in the property at the time the judgment was entered or during the redemption period specified in the judgment.

¶14 Although post-judgment motions to intervene are not precluded as a matter of law, the courts have recognized limited circumstances in which they are

permissible. Post-judgment motions for intervention may be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner. *Milwaukee Sewerage Comm'n v. DNR*, 104 Wis. 2d 182, 188, 311 N.W.2d 677 (1981). In *Milwaukee Sewerage*, the movant had the same interest prior to the entry of a stipulated judgment as it had after entry, but did not move to intervene until the parties stipulated to a change in a provision of the judgment; the court held the movant did not show a justification for failure to request intervention sooner. *Id.* at 185, 189-90. By contrast, in *C.L. v. Edson*, 140 Wis. 2d 168, 178, 409 N.W.2d 417 (Ct. App. 1987), we held that a newspaper seeking to intervene to gain access to sealed settlement documents had shown a justification for failing to intervene sooner because the newspaper could not have known of its interests in disclosure until it learned of the judgment.

¶15 Neither of these cases, nor any other we have been able to discover on post-judgment motions for intervention as of right, come close to the circumstances of this case. In both *Milwaukee Sewerage* and *C.L.*, the movant had an interest in the subject matter of the action at the time the matter was adjudicated, even though, in *C.L.* the movant did not and could not realize this until the entry of the judgment. In the federal cases relied on in *Milwaukee Sewerage* for allowing post-judgment motions to intervene, the movant had an interest that existed at the time the judgment was entered. See *Milwaukee Sewerage*, 104 Wis. 2d at 186-88. Ag Services has presented us with no authority for the proposition that acquiring an interest in property after judgment concerning the property is entered entitles one to intervene to set aside the judgment.

¶16 We are persuaded that in order to constitute a sufficient interest under WIS. STAT. § 803.09(1), the interest in real estate that is the subject of the strict foreclosure action in which the movant seeks to intervene must exist before

entry of the judgment the movant seeks to vacate. The position Ag Services advances permits parties to intervene in a foreclosure action for the purpose of vacating judgments years after the judgments are entered, based on disputes that involve different parties, different transactions, different issues of fact and different issues of law, solely because the real estate in which they have acquired an interest is the same. We conclude this is not a reasonable construction of the statute.

¶17 This is not to say that Ag Services has no opportunity to recover the damages it believes it suffered because of the conduct of the Bank and the Zdroiks. Nothing in this opinion prevents Ag Services from asserting claims for damages against the Bank and the Zdroiks in a separate action. Our holding is simply that Ag Services does not have an interest that entitles it to intervene in the Gilmeisters' action for the purpose of moving to vacate the judgment of strict foreclosure.

¶18 Ag Services cites cases for the proposition that a court may set aside a post-judgment stipulation in a land contract foreclosure action, *Levin v. Grant*, 238 Wis. 537, 300 N.W.2d 169 (1941), and for the proposition that a court may grant redemption rights based on principles of equity, *Phelan v. Fitzpatrick*, 84 Wis. 240, 54 N.W.2d 614 (1893). However, in those cases the party seeking relief had an interest in the real estate at the time the foreclosure judgment was entered. Therefore, the threshold issue that is dispositive here—the right to intervene to obtain relief from the judgment or stipulation—never arose.

¶19 Because Ag Services does not have an interest in the real estate that entitles it to intervene under WIS. STAT. § 803.09(1), the trial court properly denied Ag Services' motion to intervene and its motion for relief from judgment.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

